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No. 91-796

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In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, *et al.*,

Petitioners,

vs.

JOHN WAIHEE, *Governor of Hawaii, et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GOVERNMENT RESPONDENTS' SUPPLEMENTAL MEMORANDUM

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SUPPLEMENTAL ARGUMENT

This case has been held for conference, apparently pending the disposition of *Lee v. Weisman*, No. 90-1014 (U.S. June 24, 1992). As stated by the Court in its opinion handed down today:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance

> and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Lee v. Weisman, 1992 Westlaw 138525, 13825*6 (U.S. June 24, 1992). In our case, No. 91-796, involving Hawaii's practice of adjourning most public business on good Friday (private persons and businesses are as free to remain open or conduct their private affairs subject to others' closures as on any other day), none of the factors which warranted this Court's conclusion that the Establishment Clause was violated are present. *See* Gov't Resp. Br. in Opp. at 4-14. Indeed, none of the grounds for denial of the writ, as expressed by both opposition briefs in this case, are at all diminished by the ruling in *Lee v. Weisman*. Indeed, *Weisman*, simply stated, involves nothing more than "settled rules pertaining to prayer exercises for students." 1992 Westlaw 138525*6. This case is therefore unaffected by *Weisman*.

The Ninth Circuit, as Respondents have pointed out, applied the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and did so correctly. *Lee v. Weisman* does not counsel further review. Indeed, it does not counsel even a remand to the Ninth Circuit for further reconsideration. Such remands are generally ordered by this Court only when the intervening precedent is "sufficiently analogous and, perhaps, decisive, to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964)

(per curiam). The decision of this Court in *Weisman* does not counsel remand under this test.

CONCLUSION

For the foregoing reasons and all those previously stated by Respondents, the petition in No. 91-796 should be denied.

Dated: Honolulu, Hawaii, June 24, 1992

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